



Phil McGrane, JD, MPA
Clerk of the District Court

Trent Tripple
Chief Deputy

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8/16/2019

Mayor Dave Bieter
150 N. Capitol Blvd
Boise, Idaho 83702

Dear Mayor:

It is my understanding that next Tuesday the Boise City Council intends to consider the adoption of a resolution seeking an election on a "Special City Question" pursuant to its newly adopted Boise City Code Section 1-9-5: Special City Questions Elections.

As you know, I have expressed my reservations about the City's legal authority to request such elections. However, out of deference to the City and its electors, I chose to exercise caution in refusing to place such a Special City Question on a ballot, without a Court weighing in on the matter. As you and I discussed, it seemed an appropriate question to put before a Court through a declaratory judgment action.

Since those conversations, I have had the opportunity to request the advice and assistance of the Secretary of State, pursuant to I.C. 34-203. Secretary Denney has provided his opinion and that of the Attorney General's office, advising him in the matter. I attach both of those letters, which make it clear that the chief election official of the State shares my opinion that the City is not legally authorized to seek elections on Special City Questions of this nature. The Secretary of State has further recommended that I deny your request, if it is presented to me.

I have also been provided a copy of a memo, directed to you and the City Council on February 25, 2019, wherein, the City Attorney's office was asked to opine on the City's authority to hold a "non-binding advisory question vote". The answer provided to the Mayor and Council was an unequivocal "no", based on the identical arguments and reasoning raised by my legal counsel and the Secretary of State.

Court
Ph (208) 287-6900
Fax (208) 287-6919

Auditor
Ph (208) 287-6879
Fax (208) 287-6909

Recorder
Ph (208) 287-6840
Fax (208) 287-6849

Elections
Ph (208) 287-6860
Fax (208) 287-6939

Indigent Services
Ph (208) 287-7960
Fax (208) 287-7969

It would seem that both the County and the City are in complete agreement that no legal authority lies for a Special City Question election. To that end, it would also appear that no justiciable dispute exists that is ripe for a declaratory judgement. To the extent a request to place a Special City Question on the ballot is presented to my office, I will decline to place it on the November 5th ballot.

As you requested, I hope this assists you in your decisions on how to best move forward. I will continue to be available if you or anyone else from the City wishes to discuss this further.

Sincerely,



Phil McGrane

Cc: Council President Lauren McLean
Council President Pro Tem Elaine Clegg
Council Member Scot Ludwig
Council Member Lisa Sánchez
Council Member TJ Thomson
Council Member Holli Woodings
Jayme Sullivan



STATE OF IDAHO
OFFICE OF THE SECRETARY OF STATE
LAWRENCE DENNEY

August 13, 2019

Phil McGrane, JD, MPA
Clerk of the District Court, Ada County
200 W Front Street
Boise, Idaho 83702

Dear Clerk McGrane,

Thank you for contacting my office to request advice and support in the situation regarding the City of Boise's ordinance that would now allow for a city advisory vote under certain circumstances. After a thorough review by both my office and the Attorney General's office, we have concluded that the City does not have the authority to place such an advisory vote question on the ballot. Idaho Statute clearly outlines the election process and the authority granted to each entity within that process and does not make exception for a City to adopt practices outside of those laws.

I've included an analysis of the law provided by Deputy Attorney General Brian Kane, to provide clarification on this matter. It is our recommendation that you deny the request to place the City of Boise's special ballot question on the ballot.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lawrence Denney".

Lawrence Denney
Secretary of State, Idaho



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 13, 2019

TRANSMITTED VIA HAND DELIVERY

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse

Re: Letter from the Ada County Clerk, Phil McGrane

Dear Mr. Secretary:

This letter is in response to your inquiry seeking legal advice regarding a letter received from the Ada County Clerk, Phil McGrane. Within that letter, Mr. McGrane seeks advice and direction from the Secretary of State as the Chief Election Officer of the State of Idaho under Idaho Code §§ 34-201 and 34-203.

Consistent with the authority assigned the Secretary of State under Idaho Code § 34-203, this office recommends that the Ada County Clerk be advised to deny the City of Boise's request to place a "special ballot question" pertaining to any individual City of Boise-funded project helping to create or substantially improve a City of Boise asset where the City is reasonably expected to expend twenty-five million dollars or more in City general funds on the ballot because no express or implied authority exists for a city to create an election not authorized by the general laws of the State of Idaho. I will refer to the above described ballot question as the "special ballot question" for the purposes of analysis.

This recommendation is explained in greater detail below.

Cities Only Possess Powers Expressly or Impliedly Granted By the Constitution or Statute.

In Idaho, municipal corporations are creations of the State. Within their creation, cities are granted only that authority which is expressly or impliedly authorized by the Idaho Constitution or a statute. This authority is known as *Dillon's Rule*. *Caesar v. State*, 101 Idaho 158, 160-61 (1980). In order to determine whether a city has the ability to place the "special ballot question" on the ballot, one must analyze whether the city has either express authority in the form of a

statute or implied authority in an area not covered by the general law or not in conflict with the general law. *See id.* (citations omitted).

No Express Authority Permits A City To Place the "Special Ballot Question" Before the Voters.

Idaho's election code comprises 22 chapters within title 34, plus an additional chapter in title 50. Nowhere within those statutes is express authority for the "special ballot question" found.¹ Additionally, these statutes comprehensively address which elections may be held and at what time those elections will be held. Idaho Code § 34-106 (Limitation Upon Elections).²

As there is no express authority allowing the City of Boise to place the "special ballot question" before the voters, this analysis will review the constitution and statutes to determine if implied authority exists.

No Implied Authority Permits A City to Place the "Special Ballot Question" Before the Voters.

Although cities enjoy a direct grant of power by Idaho's Constitution, that power is limited. Article XII, section 2 limits the authority of local governments as follows:

LOCAL POLICE REGULATIONS AUTHORIZED. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations **as are not in conflict with its charter or with the general laws.**

(Emphasis added.) This constitutional provision establishes that the legislature has substantial authority with regard to the police powers of local governments.

The analysis of a city's authority to place the "special ballot question" on the ballot turns on whether the comprehensive statutory election system enacted by the legislature fully occupies the field of elections to the exclusion of cities. *Caesar*, 101 Idaho at 161. If the state has fully occupied the election field, then a city ordinance will be held to be in conflict with state law, even if not specifically prohibited. *Id.*, citing *United Tavern Owners of Philadelphia v. Sch. Dist. of Philadelphia*, 272 A.2d 868, 870 (P.A. 1971).

The authority of cities with regard to elections is limited. As set forth below, the legislature has fully occupied the field of city elections with the intent of limiting municipal discretion regarding those elections. Idaho Code § 50-405 limits city elections as follows:

50-405. GENERAL AND SPECIAL CITY ELECTIONS. (1) A general election shall be held in each city governed by this title, for officials as in this title provided, on the Tuesday following the first Monday of November in each

¹ The legislature permits counties to hold advisory ballot questions under Idaho Code § 31-718, but no corresponding authority has been granted cities.

² This provision also expressly authorizes the Secretary of State to provide interpretations for the conduct of elections under this statute. Idaho Code § 34-106(5).

odd-numbered year. All such officials shall be elected and hold their respective offices for the term specified and until their successors are elected and qualified. **All other city elections that may be held under authority of general law** shall be known as special city elections.

(Emphasis added.) Idaho Code § 50-402(b) defines “special election” as “any election other than a general election held at any time **for any purpose provided by law.**” (Emphasis added.)

Idaho Code § 50-405 therefore expressly limits city elections to only those authorized by the general laws. In other words, a city does not have the authority to create any election that has not already been authorized by law. Idaho Code sets out specific special elections that a city is authorized by law to hold. *See, e.g.*, Idaho Code § 50-803 (authorizing special elections on the question of adopting a council-manager plan); Idaho Code § 50-2104 (authorizing special elections related to city consolidation); Idaho Code § 50-326 (authorizing special elections related to water, light, power, and gas plants); Idaho Code § 50-1044 (authorizing special elections in certain resort cities related to local-option non-property taxes).

Notably, advisory ballot questions are permitted only at the county level. *See* Idaho Code § 31-718. Had the legislature intended to allow cities to hold advisory ballot questions on any topic, it would have not limited its authorization to counties.

Idaho Code also establishes more generally that the legislature intended to fully occupy the field of city elections. Elections within Idaho have been consolidated with supervisory roles for the Secretary of State and county clerks. *See generally*, title 34, chapter 2, Idaho Code (assigning virtually all election authority to these two offices). Idaho Code § 50-403 expressly assigns the county clerk as the chief elections officer of city elections. Further, the county clerk is installed as the supervisory authority over local elections officials under Idaho Code §§ 34-206 and 34-209, including related to the payment for the costs of the election. Perhaps the most straightforward analysis is that a city cannot be permitted to create elections for which the county must pay—the legislature intended to limit the costs of elections through consolidation.

Additionally, the county clerk is responsible for the registration of all city electors under Idaho Code § 50-404. The legislature has defined the qualifications for ballot access for candidates. Idaho Code §§ 50-406 and -407. Additionally, the legislature has set forth a comprehensive system for ballot access for municipal initiatives and referenda. *See* Idaho Code §§ 50-418; title 34, chapter 18. Importantly, the legislature repealed the previous municipal authority to set election rules related to initiatives and referenda in 2015. 2015 Idaho Sess. Laws 1158 (repealing former Idaho Code § 50-501). And Idaho Code § 34-106 also places a variety of limitations on how elections may be held, consistent with its title, “Limitation Upon Elections.”

In sum, it is clear that the legislature has both fully occupied the field of municipal elections, and done so in a manner expressly limiting municipal authority over elections. This office

cannot identify any gap within the comprehensive election code enacted by the legislature to reasonably defend a city's creation of the "special ballot question."

The Code Provisions Advanced by the City of Boise Do Not Provide the Requisite Authority.

The City of Boise's reliance on Idaho Code §§ 50-301, 50-302, and 50-405(1) is misplaced. Idaho Code § 50-405(1) only authorizes a city to conduct elections as authorized by the general laws. As established above, no Idaho statute authorizes the "special ballot question" or provides for the creation of elections by city ordinance.

Idaho Code §§ 50-301 and 50-302 are general authority statutes and are limited by the general laws as well. Idaho Code § 50-301 is both general and specific:

Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Reading through this provision, nothing indicates that a city has the authority to create a new election for an advisory vote on a specific topic by its citizens. If anything, this statute provides the city with its identity as a municipal corporation and allows for it to transact business as such. This provision should not be read as a broad grant of authority to cities on virtually any topic, particularly when a comprehensive series of more specific statutes govern.

Similarly, Idaho Code § 50-302(1) appears inapplicable:

PROMOTION OF GENERAL WELFARE — PRESCRIBING PENALTIES. (1) Cities shall make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine, including an infraction penalty, or incarceration; provided, however, except as provided in subsection (2) of this section, that the maximum punishment of any offense shall be by fine of not more than one thousand dollars (\$1,000) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

This statute makes no reference to elections, and appears to be specifically drafted to allow cities to make ordinances as allowed by law that can carry civil and criminal penalties with

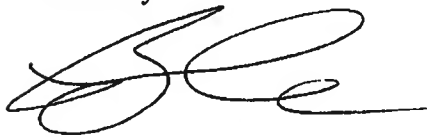
them. The creation of an advisory election cannot reside comfortably in the shade of this statute because it is not any sort of enforcement ordinance as contemplated by Idaho Code § 50-302. Idaho Code § 50-302 cabins city authority consistently with article XII, section 2 of the Idaho Constitution by limiting city ordinance authority to only those not inconsistent with the laws of the state of Idaho.

As demonstrated above, the legislature has created a comprehensive and consolidated series of election statutes with clearly delineated authority for state, county, and other political subdivisions. The broad grant of implied authority required by the City of Boise to place the "special ballot question" upon the ballot is simply not found within existent Idaho law.

Based upon the analysis above, this office advises that the Secretary of State recommend that the Ada County Clerk deny the City of Boise's attempt to place the "special ballot question" upon the ballot.

Please contact me if you would like to discuss any of this in greater detail.

Sincerely

A handwritten signature in black ink, appearing to read 'BPK', with a long horizontal flourish extending to the right.

Brian P. Kane

BPK/kdh



OFFICE OF THE MAYOR

MAYOR: David H. Bieter

MEMO

TO: Mayor & City Council Members
FROM: Jade Riley
DATE: 2/25/2019
RE: City Advisory Question Elections

Conceptually, there are two foreseeable paths for Boise City to do an advisory vote; the city on its own would call an advisory vote, or alternatively the city would request Ada County to conduct an advisory vote for the city. This memorandum outlines the analysis which has led us to the conclusion that neither path is viable for the city at this time. This memorandum also addresses the confusion surrounding an Association of Idaho Cities ("AIC") and Idaho Secretary of State ("SOS") document that speaks to city advisory votes.

Initially, city staff posed the question to our Legal Department of whether or not a city itself can call for a non-binding advisory question vote. The answer to that inquiry was no. There are no provisions of Idaho Code which afford cities the authority (or prohibit) to conduct an advisory vote. Simply put, Idaho Code is silent on the issue. With that context, city lawyers concluded that we could not ourselves call for an advisory vote for the following reasons:

1. Idaho Code does expressly authorize certain public entities to conduct advisory elections. Specifically, Idaho Code Section 31-718 specifically provides counties the ability to place advisory questions on the ballot.¹ However, as stated, Idaho Code is silent as to whether a city may similarly introduce advisory questions on a ballot. In this case, the legal maxim regarding statutory interpretation which holds that when you have the express inclusion of one thing, anything concurrently excluded is purposeful². Consequently, the express grant of this power to counties and the lack thereof in regards to cities is deemed purposeful.
2. Additionally, Idaho is a "Dillon's Rule" state, which generally means that city authority must be expressly outlined in Idaho Code. Again, as Idaho Code is silent on city authority and advisory votes, the lack of express authority is not ambiguous, it is dispositive.

¹ Idaho Code Section 31-718: "ADVISORY BALLOT QUESTIONS. The board of county commissioners shall have the authority to place a question on the ballot pertaining to any issue before the citizens of that county during a primary or general election. The results of such an election shall be advisory only."

² "expressio unius est exclusion alterius"

The second approach considered was to ask Ada County, which clearly does have the authority to conduct advisory elections, to place an advisory question on ballots in the May election for voters eligible to vote in Boise City elections. Early on, this appeared to be a viable approach, because of the clear authority cited above. However, upon conducting further research and analysis, which was not completed until late in the day on February 19, 2019, it became clear that the prescribed process for counties to conduct advisory elections only allows for such a vote to occur in even-numbered years ("during a primary or general election"³).

Adding to some confusion is the "2017 Election Manual for City Clerks" (the "Manual"), which was authored by the AIC and was "[P]repared in Cooperation with Idaho Secretary of State Lawrence Denney". At several points in the Manual, the term advisory question or advisory vote is used. However, there are no citations to any Idaho Code Section in the manual which outline the statutory authority for cities to conduct advisory question elections. On Thursday, February 21, 2019, city staff spoke with AIC legal counsel about the Manual. AIC legal counsel did not prepare the Manual, but did confirm to city staff that there are no Idaho Code Sections which expressly confer authority (or prohibit) cities from conducting advisory question elections.

Historically, there are examples of cities in Idaho conducting advisory question elections. However, importantly there have not been any such elections conducted by cities (that we are aware of) since the consolidation of elections in Idaho, which took place in 2011. Prior to 2011, most cities conducted their own elections, whereas after January, 2011, the responsibility for conducting elections was vested with county clerks. While it is not clear, it is the opinion of Boise City's Legal Department that what mostly happened is that cities simply conducted their own advisory question elections without the authority to do so. Because advisory votes are non-binding and have no legal affect other than to inform elected officials, these advisory votes were never legally challenged.

Please let me know if you have any additional questions or concerns and we can work to address them.

³ ID

